TEXAS COURT OF CRIMINAL APPEALS

No. PD-1096-19

Ex parte Christopher Rion

On Discretionary Review from the Fifth Court of Appeals
No. 05-19-00280-CR

On Appeal from Criminal District Court No. 5, Dallas County
No. WX18-90101

Appellant Rion's Response to the State's Petition for Discretionary Review

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680

I. Identity of Parties, Counsel, and Judges

Christopher Rion, Appellant

Michael Mowla, attorney for Appellant at trial, on appeal, and on discretionary review

Kirk Lechtenberger, attorney for Appellant at trial

Katherine Haywood, attorney for Appellant at trial

State of Texas, Appellee

John Creuzot, Dallas County District Attorney

Faith Johnson, Dallas County District Attorney (at time of trial)

Susan Hawk, Dallas County District Attorney (when indictment was returned)

Brian Higginbotham, Dallas County Assistant District Attorney

Scott Wells, Dallas County Assistant District Attorney

Sable Taddesse, Dallas County Assistant District Attorney

Judge Carter Thompson, Presiding Judge of Crim. Dist. Ct. No. 5, Dallas Co.

Justice Bill Whitehill, Fifth Court of Appeals

Justice Bill Pederson, III, Fifth Court of Appeals

Justice Robbie Partida-Kipness, Fifth Court of Appeals

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To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant respectfully submits this Response to the State's Petition for Discretionary Review:

IV. Statement of the Case, Procedural History, and Statement of Jurisdiction

The State has filed a Petition for Discretionary Review ("PDR"), asking this Court review the *Memorandum Opinion* ("Opinion") and Judgment of the Court of Appeals in *Ex parte Rion*, No. 05-19-00280, 2019 Tex.App.-LEXIS 8318 (Tex.App.-Dallas Sep. 13, 2019) (mem. op., not designated for publication), handed down on September 13, 2019. The Court of Appeals reversed the Order of the trial court signed on February 1, 2019 (CR.706)[1] in which the trial court denied Appellant's *Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy, and in the alternative, a Motion for Continuance* (CR.91-128) ("Application").

The cause number of the trial court writ-application proceedings is WX-90101. Throughout this Response, Appellant will refer to the case

[1] The Clerk's Record is cited as "CR.__" or "CR-Supp.__" The Reporter's Record from companion trial court cause number F15-71618 is included in the Clerk's Record (CR.131-661) and will be cited as it appears by volume (i.e., RR1-RR6 followed by the page number) and by its location in the Clerk's Record. The court reporter also filed exhibits with this Court under State's Exhibit 4, which are cited as "SX-4.____."

underlying this appeal (and writ-proceeding) by the trial cause number F15-72104 (CR.8) and "pending trial." Appellant will refer to the case that led to the Application by cause number (F15-71618) or as the "acquitted case." (CR.89).

On October 13, 2019, the State filed a Motion for Rehearing. It was denied on November 1, 2019.

On November 13, 2019, the State filed the PDR. This Response follows.

V. Statement Regarding Oral Argument

Appellant does not believe that oral argument is necessary. The Opinion was correct. But if oral argument is granted to the State, Appellant requests that he also be allowed to argue. *See* Tex. Rule App. Proc. 68.4(c) (2019).

VI. Response to the State's Ground for Review

Ground 1: The Court of Appeals was correct by holding that the trial court abused its discretion in denying the Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy on the issue of whether the State may try Appellant again for aggravated assault under a theory that he was reckless in causing the accident. The issue of Appellant's recklessness in causing the accident is subject to collateral estoppel as the Court of Appeals held.

VII. Argument

1. Response to the State's Ground for Review: The Court of Appeals was correct by holding that the trial court abused its discretion in denying the Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy on the issue of whether the State may try Appellant again for aggravated assault under a theory that he was reckless in causing the accident. The issue of Appellant's recklessness in causing the accident is subject to collateral estoppel as the Court of Appeals held.

Introduction

After the Court of Appeals handed down the Opinion on September 13, 2019, on October 9, 2019, this Court handed down the opinion in *Ex parte Adams*, No. PD-0711-18, 2019 Tex.Crim.App. LEXIS 979 (Tex.Crim.App. Oct. 9, 2019) (designated for publication). Based on *Adams*, the State argued in its Motion for Rehearing that *Adams* supports its argument that collateral estoppel should not apply in this case. The Court of Appeals denied the Motion. As the arguments below will show, the Court of Appeals was correct because *Adams* was decided on materially different facts and a different theory of collateral estoppel than Appellant's case.

The facts of *Adams* and how it was decided

Appellant understands that this Court knows how it decided *Adam*. But for purposes of adequate briefing, Appellant discusses its facts and how it was decided.

In *Adams*, Graves saw Adams stab Justin several times in the back and Joe in the back. *Id.* at *1-2. Per Joe, when Justin and Hisey began arguing, Joe tried to calm them. *Id.* at *2. Because Justin and Hisey would not stop, Joe told them to "get it over with," the two started fighting, and Hisey was knocked down. *Id.* Joe pushed Justin back to allow Hisey to get up. *Id.* at *2-3. Justin and Hisey started wrestling. *Id.* at *3. After Joe tried to pull Justin off Hisey, Joe felt hot liquid (he had been stabbed). Justin yelled that Adams had a knife and began wrestling with Adams. *Id.*

Justin was fighting and wrestling Hisey on the ground for about 30 seconds until Joe broke them up. *Id.* Justin was blindsided by a punch from Adams. Justin and Adams began fighting until Graves screamed that Adams had a knife. *Id.*

Hisey was attacked by Justin and fell to the ground. Hisey covered his ears and face while Justin beat him on the head, knocking him unconscious. *Id.*

Per Adams, Hisey was laying on the ground and getting his head hit by Justin. Adams attempted to break up the fight, but Joe intervened and said, "let them fight." *Id.* Referring to Hisey, Adams replied, "it's not a fight, he's out." *Id.* at *3-4. When Adams went towards Justin to pull him off Hisey, Joe hit Adams. *Id.* at *4. Adams panicked and pulled out his pocketknife. When Justin came at him, Adams started swinging the pocketknife. Adams struck Joe. Justin tackled Adams. Adams felt punches so he began swinging the pocketknife and hit Justin. Adams said he was trying to protect himself and Hisey, who was down. With Justin and Joe coming at him, Adams felt overwhelmed and was afraid that just as Justin would not stop hitting Hisey, Justin and Joe would not stop hitting Adams. *Id.*

Adams was charged in two cases with Aggravated Assault against Justin and Joe. *Id.* The Justin-case went to trial. *Id.* The jury charge instructed the jury on Aggravated Assault with a deadly weapon and Aggravated Assault by causing serious bodily injury. It included defensive issues of the use of deadly force in defense of a third person. *Id.* The jury found Adams **not** guilty. *Id.* at *5.

The State proceeded with the Joe-case. *Id.* Adams filed a writ of habeas corpus claiming that the Joe-case involves the same issue that was decided in the first trial: whether Adams was justified in using force in defense of a third person, i.e., collateral estoppel. *Id.* The court of appeals reversed, finding that the prosecution for Aggravated Assault in the Joe-case was collaterally estopped. *Id.* at *6-7.

This Court reversed. In the first trial (the Justin-case), the issue that was necessarily decided was the defensive issue related to **Justin**, **not** to Joe. The jury instructions showed that Adams was charged with Aggravated Assault with a deadly weapon and causing serious bodily injury. Paragraph one instructed the jury to find Adams "Not Guilty" if it found that the State did **not** prove Aggravated Assault with a deadly weapon. If the jury agreed that the State proved Aggravated Assault with a deadly weapon, the jury was to return a "Not Guilty" verdict if it found that the State failed to overcome the defensive theory.

The application-section relating to deadly force in defense of another instructed the jury, "[I]f you have found the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense

of another. To decide the issue of defense of another, the jury was to determine whether the state has proved beyond a reasonable doubt one of the following elements: (1) Adams did **not** believe his conduct was immediately necessary to protect Hisey against Justin's use or attempted use of unlawful deadly force; or (2) Adams's belief was **not** reasonable; or (3) under the circumstances as Adams reasonably believed them to be, he would **not** have been permitted to use force or deadly force to protect himself against the unlawful force or unlawful deadly force with which Adams reasonably believed Justin was threatening Hisey. If the jury found that the State failed to prove beyond a reasonable doubt either element 1, 2 or 3, the jury was to find Adams "not guilty" of aggravated assault as alleged in paragraph one of the indictment.

The jury was similarly instructed in paragraph two to find Adams "Not Guilty" if the State failed to prove aggravated assault by causing serious bodily injury, or if the State proved it, the jury found that the State failed to overcome the defense.

By its "Not Guilty" verdict, the jury determined that the State failed to prove aggravated assault or disprove the defense. Thus, this Court found, the "single rationally conceivable issue in dispute before the jury"

was whether Adams acted reasonably to defend Hisey against Justin's attack.

Adams did **not** contest whether aggravated assault was proven. His voir dire mostly discussed the defensive issue and the State's burden to disprove it. Adams did **not** deny that there was an assault. And during closing argument, Adams stated there was an assault and focused on the defensive issue. The question of whether Adams committed aggravated assault with a deadly weapon or causing serious bodily injury was **not** in dispute. Adams testified that: (1) he was swinging his knife at Justin (there was evidence that Justin was stabbed but **no** evidence that someone else stabbed Justin); and (2) when he drew his knife, he was trying to protect himself and Hisey.

Thus, Adams's intent may be inferred from the extent of Justin's injuries. The evidence showed that Justin's injuries were intentionally inflicted. The jury could **not** have rationally found that Adams did **not** commit aggravated assault or that Justin was **not** the victim. The evidence of Adams's aggravated assault against Justin and the defensive strategy of admitting assault but justifying it to defend Hisey from Justin

means that the jury's "Not Guilty" verdict could have happened only because it accepted Adams's defense that he needed to protect Hisey.

Thus, this Court found that Adams's acquittal was based on a defense specific to Justin and **not** whether Adams was justified in his use of force against Joe, who was **not** fighting Hisey. This issue was **not** necessarily decided by the jury in the first trial, so it is **not** subject to collateral estoppel. The jury's "Not Guilty" verdict acquitting Adams of aggravated assault against Justin was therefore **not** a final jury determination that Adams was justified in using force against Joe to defend Hisey. Consequently, this Court held that when a defendant is acquitted on a defense-of-a-third-person theory after stabbing a person engaged in a fight, collateral estoppel does **not** bar a subsequent prosecution for stabbing another person who was **not** fighting.

The facts of Appellant's case and theory of collateral estoppel on which the Court of Appeals decided it are materially different than the facts and theory of collateral estoppel in *Adams*

The facts of Appellant's case fits perfectly within collateral estoppel, which bars a subsequent prosecution if: (1) relevant facts were "necessarily decided" in the first proceeding; and (2) if such "necessarily-decided" facts form an essential element of the charge in the pending

trial. *Ex parte Taylor*, 101 S.W.3d 434, 439-440 (Tex.Crim.App. 2002); *Murphy v. State*, 239 S.W.3d 791, 794 (Tex.Crim.App. 2007). The State refers to collateral estoppel as a "finicky thing" (State's PDR, p. 9), but it must merely fall within the elements described in *Taylor* and *Murphy*. The State makes much of the jury charge (State's PDR, p. 11-12) since this Court focused on it in *Adams*, but this argument is unavailing.

Appellant's case is simple: Aggravated Assault may be committed intentionally, knowingly, or recklessly. *Rion*, *id.* at *24-25, *citing* Tex. Penal Code § 22.01(a)(1) (2015), & Tex. Penal Code § 22.02(a) (2015). The indictment in F15-72104 alleges that Appellant intentionally, knowingly, and recklessly caused bodily injury to Loehr using his motor vehicle, a deadly weapon. (CR.8). The Court of Appeals concluded that if the State "…pursues the pending case against Appellant on a theory that he was reckless, then the precise issue raised, litigated, and finally determined in Appellant's favor in the (acquitted case)—that Appellant was not reckless in driving 71 miles-per-hour, losing control of his vehicle, and causing a collision—would be an essential element of the offense in the second trial." *Rion*, *id.* at *25.

The jury charge submitted by the trial court in the acquitted case closely tracks the statutory definitions of the mens rea. *Rion*, *id.* at *16. And the State, despite its focus on the jury charge, ignores that defense counsel focused on the recklessness issue in detail in his closing argument as set forth by the Court of Appeals. *Rion*, *id.* at *19-20. Defense counsel focused on the recklessness issue, whether Appellant was aware of the risk but consciously disregarded that risk—with recklessness requiring that a person be aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur, which tracks Tex. Penal Code § 6.03(c) (2015).

Throughout the trial and the closing arguments, defense counsel made did **not** raise a separate ground for acquitting Appellant, but merely buttressed the theory that Appellant suffered a mental breakdown that rendered him not criminally liable for his conduct. *Rion*, *id.* at *11, 20. The trial court charged the jury on the lesser-included offense of Criminally Negligent Homicide over defense counsel's objections. *Rion*, *id.* at *8.

When this Court considers "with realism and rationality" the trial record, pleadings, charge, and arguments of the State and defense, it should conclude that the jury necessarily found on the fact of recklessness in Appellant's favor, so this issue **cannot** be litigated again in a second criminal trial. *Rion*, *id.* at *14; *citing* *Ashe v. Swenson*, 397 U.S. 436, 445 (1970), *Taylor*, 101 S.W.3d at 441-442, and *Ex parte Watkins*, 73 S.W.3d 264, 268-269 (Tex.Crim.App. 2002).

This is **not** the frowned-upon "hypertechnical approach" but a straightforward consideration of the facts that were "necessarily decided" in F15-71618 that form an essential element of the pending trial for Aggravated Assault:

Both cases arise out of the same event (the car accident) and the exact same time, which was on August 1, 2015 at about 5:30 p.m. (CR.164-172, 175-180, 183, 544-553, 557-558; RR3.9-17, 20-25, 28; RR6.SX1-SX7, SX10);

Appellant failed to drive in a single lane of traffic, crossed over into the eastbound lane, jumped the median, and collided into the front of the Highlander (CR.176-180, 216-219, 237-241, 251-254, 557-558; RR3.21-25, 61-64, 82-86, 96-99; RR6.SX10);

The impact caused the Highlander to travel backwards 200 feet and stop on the sidewalk (CR.220, 238; RR3.65.83); and

The impact caused non-life-threating injuries to Loehr and life-threatening injuries to Parnell (CR.172-174, 204-209, 219-225, 240-241, 268, 293-308; RR3.17-18, 49-54, 64-70, 85-86, 113, 138-153).

These facts led the State to see and obtain an indictment against Appellant for Manslaughter, which has a mens rea of recklessness. Tex. Penal Code § 19.04 (2015). The jury found against the State on the issue of recklessness in the acquitted case, which has the exact same facts as the pending case except who the complainants are. These facts were necessarily-decided against the State by the jury in the acquitted case as insufficient as a matter of law for Manslaughter under Tex. Penal Code § 19.04 (2015): (1) recklessly (2) caused the death of an individual (Parnell), and form these essential elements of Aggravated Assault with a Deadly Weapon: (1) intentionally, knowingly, or recklessly (2) causes bodily injury to another (Loehr) and (3) the person uses or exhibits a deadly weapon during the commission of the assault (Appellant's vehicle). It is **not** relevant for collateral estoppel that Aggravated Assault with a deadly weapon and Manslaughter have the same elements. It is

relevant here only that they share a possible mens rea of recklessness, and this issue was necessarily decided against the State during the first trial.

Thus, what occurred in Appellant's case is materially different than what occurred in *Adams*, which again led to this Court deciding that when a defendant is acquitted on a defense-of-a-third-person theory after stabbing a person engaged in a fight, collateral estoppel does **not** bar a subsequent prosecution for stabbing another person who was **not** fighting. Nothing about Adams is like what occurred on Appellant's case other than that one of the charged offenses (Aggravated Assault) was the same and the issue was collateral estoppel.

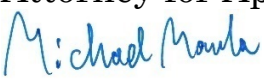
Appellant also requested that the cases be tried at the same time, but both the State and trial court refused. (CR.78-84). This is unlike *Currier v. Virginia*, 138 S.Ct. 2144 (2018), where the parties agreed to a severance of the charges. This severance is opposite to what occurred in Appellant's case. *Id.* at 2155-2156.

VIII. Conclusion and Prayer

The Court of Appeals was correct in the Opinion. Appellant prays that the Court refuse the PDR.

Respectfully submitted,

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Attorney for Appellant



/s/ Michael Mowla
Michael Mowla

IX. Certificate of Service

I certify that on December 2, 2019, a copy of this document was served on the Dallas County District Attorney's Office, Appellate Division, by efile to brian.higginbotham@dallascounty.org and DCDAAppeals@dallascounty.org, and on the State Prosecuting Attorney by efile to stacey.soule@spa.texas.gov, john.messinger@spa.state.tx.us, and information@spa.texas.gov. *See* Tex. Rule App. Proc. 9.5 (2019) and Tex. Rule App. Proc. 68.11 (2019).

/s/ Michael Mowla
Michael Mowla

X. Certificate of Compliance with Tex. Rule App. Proc. 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does **not** exceed 2,400 words. Using the word-count feature of Microsoft Word 2018, this document contains **2,398** words **except** in the following sections: caption; identity of parties, counsel, and judges; table of contents; table of authorities; statement regarding oral argument; statement of the case, procedural history, and statement of jurisdiction; statement of issues presented (grounds for review section); signature; certificate of service; certificate of compliance; and the appendix; and (2) the typeface requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2018 in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2019).

/s/ Michael Mowla
Michael Mowla